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Nos. 03-334, 03-343

IN THE

Supreme Court of the United States

SHARIQ RASUL ET AL.,

Petitioners,

v.

GEORGE W. BUSH ET AL.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF FORMER AMERICAN PRISONERS OF WAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Prisoners of war are in a vulnerable situation, at the mercy of their captors and beyond the reach of their own government. Force of arms cannot protect them, and the force of law relies on a reciprocal, consensual regime of understandings among the combatant nations robust enough to be recognized and respected despite the emotions and exigencies of war. *Amici* have been in that vulnerable position, have benefited from these international understandings, and have suffered in their absence. The Geneva Conventions on the treatment of those detained in a combat zone, the body of law amplifying those Conventions, and the United States' commitment to implementing them, were, at that critical juncture, their primary protection and the only means our government had to protect them.

Amici are Leslie H. Jackson, Edward Jackfert, and Neal Harrington, former American prisoners of war detained by the German and Japanese governments during World War II. Mr. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans' organization that represents approximately 50,000 former prisoners of war and their families. Mr. Jackfert is the former National Commander of the American Defenders for Bataan & Corregidor, Inc., an organization that supports former POWs held by the Japanese during World War II. Mr. Harrington is also involved in POW activities, particularly relating to those who, like he and Mr. Jackfert, survived the infamous Bataan Death March.

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

Mr. Jackson was captured by the German Army on April 24, 1944, when his B-17 bomber crashed. Jailed and interrogated for approximately one week, he was then transported to Stalag 17, a converted concentration camp. In his 13 months of captivity, Mr. Jackson was granted the bare necessities: shelter, minimal food, and the ability to socialize with other American POWs. While the experience was harsh and unpleasant, Mr. Jackson was never tortured or otherwise hurt by the German guards. To follow the terms of the Geneva Conventions of 1929, to which Germany was a party, Mr. Jackson's German captors placed the appropriate Geneva Convention signage in the barracks, permitted the International Red Cross to ship basic necessities to the POWs, and allowed a Geneva inspector to survey the premises. Mr. Jackson believes that his survival and relatively good health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Mr. Jackfert and Mr. Harrington in the custody of Japan, which had not ratified and did not purport to follow the 1929 Geneva Conventions, offer a sharp contrast. Both men were serving with the U.S. Army in the Philippines when the surrender there to the Japanese occurred in 1942, and both subsequently served several years of hard captivity beyond the reach of any Geneva Convention protections. Both were part of the Bataan Death March and its well-documented horrors. Mr. Harrington was forced into slave labor in a Japanese coal mine, and saw his compatriots starved, beaten, and killed. Mr. Jackfert was also forced into slave labor and suffered the extreme effects of heavy labor and cruelly inadequate nourishment, going from 125 pounds to 90 pounds in a matter of months. There was no Geneva signage, no recognized prisoner rights, and virtually no Red Cross access.

Nor were the experiences of Mr. Harrington and Mr. Jackfert atypical. Studies have determined that the death rate of U.S. military personnel interned by Japan was as high as

40%, while the death rate of personnel captured and interned by Germany was little more than 1%. *See* Charles A. Stenger, *American Prisoners of War in WWI, WWII, Korea, Vietnam, Persian Gulf, Somalia, Bosnia, and Kosovo* (2000), *cited in* Gary K. Reynolds, Congressional Research Service, *U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan* 10 (updated July 27, 2001); *see also Encyclopedia of Prisoners of War and Internment* 329, 335 (Jonathan F. Vance ed., ABC-CLIO 2000) (providing similar estimates). Moreover, while it was rare for American POWs detained in Germany to be tortured, the opposite was true for American POWs in Japan. "No one can adequately impart the suffering most Allied prisoners endured [in Japan] . . . . They were beaten, kicked, robbed . . . and were buried alive. . . . [T]he overwhelming majority endured 'hell on earth'. . . ." *Encyclopedia of Prisoners of War and Internment*, *supra*, at 336.[2]

As a result of their own experiences, *amici* have an interest in fostering the development, acceptance, and enforcement of international norms pursuant to which prisoners of war and others captured during armed conflicts

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[2] Notably, the difference in treatment of American POWs was not merely the result of differences between the Germans and the Japanese. Contrary to their humane treatment of American POWs, the Germans treated prisoners from Russia, which had not ratified the Geneva Conventions of 1929, with absolute cruelty. "Of 5.7 million captured Red Army soldiers, about 3.3 million died in German captivity—a staggering mortality rate of 57 percent." *Id.* at 329. Nor was this simply a function of the harsh Russian climate. German soldiers deliberately starved Russian POWs, forced them into slave labor, and sent some to the gas chambers. *Id.* at 331. Thus, the importance of the Geneva Conventions—not simply of their existence, but of the reciprocity enjoyed by mutual parties to the Conventions—cannot, and should not, be underestimated.

will be treated humanely and in accordance with the rule of law. In particular, *amici* wish to ensure that the treatment by the United States of foreign detainees during the ongoing armed conflicts in Afghanistan, Iraq, and elsewhere is such that the United States and former American POWs retain the moral authority to demand fair and humane treatment for any future Americans detained by foreign governments. *Amici* also support the involvement of the judiciary in the development and evolution of the substantive and procedural norms protecting such persons on the conviction that a well-developed and stable body of laws and rules is more likely to result in even-handed, predictable, and humane treatment of detainees by the nations of the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

To what did the United States and 142 other sovereign nations agree when they became parties to the Geneva Conventions of 1949?

> Only that [they] could not kill, or other otherwise maltreat, protected persons such as the sick and wounded, prisoners of war, and civilian noncombatants, and that [they] must meet certain minimum standards in [their] treatment of these individuals. Can any State advance the argument that it refuses to ratify such an international agreement because it does not wish to have its 'national security' jeopardized by having its sovereign power of action limited in these respects, that it wishes to retain an unfettered ability to kill and maltreat these individuals at will?

Howard S. Levie, *Prisoners of War in International Armed Conflict* in 59 Int'l Law Studies 21 (1978).

The principle that humanitarian norms apply to prisoners of war and others detained during armed conflicts has at last, following a long history of horrors in captivity, achieved near-universal acceptance. The Geneva Conventions, which were negotiated in the wake of the two World Wars, confer upon captured persons both substantive rights and the

procedural right to a judicial determination of their proper status, thereby providing a predictable level of protection to those who are among the most vulnerable of the victims of war. The widespread acceptance of, and adherence to, these common principles of international humanitarian law is due, in significant part, to the standard set by the United States in its historically fair and humane treatment of detainees.

The United States has ratified the Geneva Conventions, expressly incorporated them into its written military regulations, and adhered to them in prior conflicts. Over the past half-century, moreover, the United States has played a prominent role in demanding that detainees be treated by foreign governments in accordance with the Geneva Conventions. Recently, however, the United States' treatment of detainees captured during the war on terrorism and its reluctance to reconcile its actions with the norms of the Geneva Conventions or submit them to the scrutiny of the courts, has resulted in international skepticism and cynicism about the United States' commitment to those norms.

It is vital to the preservation of the United States' moral authority in the international community that all three branches of government demonstrate an unwavering commitment to the application of the Geneva Conventions and the principles of due process reflected therein. Contrary to the D.C. Circuit's conclusion that the courts should not be involved in this process, the development of international humanitarian law would benefit from judicial participation in the case currently before this Court. Even where executive discretion is broadest, the *fact* of judicial review is a formidable protection. There is law to apply here: impartial tribunals are particularly well-suited to determine whether petitioners' detentions comply with the procedural and substantive guarantees found in the Geneva Conventions, United States military regulations, and the United States Constitution. Indeed, the Conventions and military regulations expressly contemplate the involvement of

competent tribunals in making such determinations and were designed to avoid the exact circumstance now facing petitioners—a complete deprivation of the procedures designed to protect them until an individualized determination of their status has been made.

Even if petitioners' claims are ultimately deemed to lack merit, independent judicial review would erase the suspicion of executive overreaching and provide the international community with assurances that the United States' detentions are not arbitrary or in derogation of the Geneva Conventions.

Just as significantly, judicial review will enable the courts of the United States to contribute to the long-term development and evolution of international humanitarian law by giving meaning to, and filling the interstices in, the governing principles. This, in turn, will lead to a mature and stable body of rules that can be predictably applied by, and demanded of, all nations in all future conflicts.

Finally, judicial review is appropriate here because petitioners' claims satisfy the threshold conditions for jurisdiction and justiciability and because prior decisions of this Court indicate that constitutional protections can extend to aliens abroad. Indeed, denial of petitioners' right to test the legality of their detentions would subvert the historical scope of the Great Writ and, contrary to well-settled canons of construction, would require an interpretation of the habeas statute at odds with the United States' obligations under international law. Therefore, this Court should limit the application of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and allow judicial review of whether the Guantánamo detainees are entitled, under the U.S. Constitution, the Geneva Conventions, and the United States' own military regulations, to individualized status determinations.

ARGUMENT

I. FAILURE TO REVERSE THE DECISION BELOW WILL ENDANGER AMERICAN SOLDIERS BY UNDERMINING THE AUTHORITY OF THE UNITED STATES TO DEMAND THAT OTHER NATIONS COMPLY WITH INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions provide crucial uniformity and predictability in the standards for the humane treatment of all persons captured during armed conflict. Although the Geneva Conventions themselves do not offer protection to captured persons who are deemed "unlawful" or "enemy" combatants, they do provide an explicit mechanism for determining which individuals are eligible for protection under the Conventions. The obligation to provide a predictable status-determination process is as important as the substantive rights themselves. Without such procedural uniformity, the international community would have no power to regulate the treatment of individuals detained by enemy forces, and the capturing power would have no obligation to provide prisoners with any protections at all.

The D.C. Circuit's ruling that the judiciary shall have no role in ensuring that such procedures are afforded to foreign citizens who are captured by the U.S. military and detained outside the territorial boundaries of the United States threatens to undermine both the safety of Americans worldwide and the reputation of the United States as an exemplar in the application of humanitarian law.

A. The Geneva Conventions Require Individualized Status Determinations by Competent Tribunals

"[I]n nothing connected with war has a greater improvement been wrought than in the treatment of prisoners of war." J. V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40 (1950). Although an earlier Geneva Convention was ratified in 1929 and played a significant role in World War

II, *see supra* pp. 2-3 & note 2, the regime of humanitarian law in place today is based upon the four Geneva Conventions of 1949, including the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"), and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention"), both of which the United States ratified in 1955. *See* Third Geneva Convention, 6 U.S.T. 3316, 3316; Fourth Geneva Convention, 6 U.S.T. 3516, 3516.

The Third Geneva Convention provides a prisoner of war with a set of substantive rights, including humane treatment, access to Red Cross packages, postal services, and protection from interrogation, as well as the procedural right to have an individualized determination of his status as either a prisoner of war, a civilian, or an enemy combatant. The substantive protections apply to persons who are "[m]embers of the armed forces of a Party to the conflict" or "[m]embers of other militias and . . . volunteer corps . . . belonging to a Party to the conflict," provided that certain additional considerations are satisfied. *See* Third Geneva Convention, arts. 4, 6, 6 U.S.T. at 3320, 3324, 75 U.N.T.S. at 138, 142. The procedural protections ensure that if there is "*any doubt* . . . as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy" are protected by the Convention, "such persons shall enjoy the protection of the . . . Convention until such time as their status has been *determined by a competent tribunal*." *Id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added).

The Fourth Geneva Convention relates to the protection of civilians in times of war. It, too, provides both substantive rights to humane treatment and procedural rights relating to status determinations. *See* Fourth Geneva Convention, art. 43, 6 U.S.T. at 3516, 3544, 75 U.N.T.S. at 287, 314; Jordan J. Paust, *Judicial Power to Determine the Status and Rights*

of Persons Detained Without Trial, 44 Harv. Int'l L.J. 503, 511-12 (Summer 2003). In particular, with certain narrow exceptions, civilians who have been interned have the right promptly to challenge their detentions before an appropriate court or administrative board. *See* Fourth Geneva Convention, art. 43, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

The intent of these provisions is to ensure that alleged belligerents, such as petitioners, receive substantive protections unless and until their status as unlawful combatants has been determined in accordance with the rule of law. More specifically, Article 5 of the Third Geneva Convention

> serves a double purpose: (1) it prohibits the procedure sometimes followed in the past of executing first and investigating later—the individual who falls into the hands of the enemy is entitled to the protection of the Convention until the contrary is *established*; and (2) it provides for the determination of cases involving disputes as to the entitlement of individuals to prisoner-of-war status to be made by a 'competent tribunal' . . . .

Levie, *Prisoners of War in International Armed Conflict*, *supra*, at 55-56 (footnote omitted, emphasis added). These protections have not been followed with respect to the Guantánamo Bay detainees, for it cannot be said that the Executive Branch has satisfactorily "established" that each detainee is undeserving of the protections offered by the Conventions. To the contrary, the Third Geneva Convention envisions, and requires, an individualized determination by a competent tribunal for each alleged belligerent.

The principle of fair procedure is so integral to the overall scheme that the Third Geneva Convention even provides for sanctions in the case of violation:

> The real teeth of enforcement of the Convention, supplementing the usual sanctions of International Law, i.e., condemnation of world public opinion and fear of reprisal, is found in Articles 129 and 130 wherein it is

> prescribed that the signatory nations shall undertake to enact any legislation necessary to provide effective penal sanctions for persons . . . willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention.

Dillon, *supra*, 5 Miami L.Q. at 62 (citing Third Geneva Convention, arts. 129 & 130, 6 U.S.T. at 3418, 3420, 75 U.N.T.S. at 236, 238). Moreover, at the 1949 Geneva Conventions conference, the United States took the position that "the essential guarantees of a fair trial should be provided all prisoners of war and conventionally prescribed treatment should even be applicable after conviction." *Id.* at 58. While the United States' position at the conference did not specifically address the procedural question of a suspected unlawful combatant's right to a status determination, it did underscore the United States' clear intention to uphold principles of due process, even in wartime and even against war criminals.

In sum, in addition to providing one set of substantive rights for prisoners of war and another set for civilians, the Geneva Conventions also guarantee procedural protections—including the involvement of competent tribunals—to ensure that detained individuals are categorized properly and that they receive the substantive protections to which they are entitled based on their particular status. Pursuant to the Geneva Conventions,

> [e]very person in enemy hands must have some status under international law: he is either a prisoner of war . . . covered by the Third Convention, a civilian covered by the Fourth Geneva Convention or . . . a member of the medical personnel . . . covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

J. S. Pictet, *Commentary of the Fourth Geneva Convention* 51 (Geneva: International Committee of the Red Cross 1952); *see also* Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 Fletcher F. World Aff., Summer/Fall 2003, at 55, 57.

B. The Government's Treatment of the Guantánamo Bay Detainees Is Inconsistent With the United States' Past Adherence to the Geneva Conventions

The United States has chosen to implement the Geneva Conventions as part of its written military regulations. Thus, Army Regulation 190-8 states:

> [I]n accordance with Article 5, [Geneva Convention III] . . . [a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities . . . and who asserts that he or she is entitled to treatment as a prisoner of war . . . .

U.S. Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," § 1-6, Depts. of the Army, the Navy, the Air Force, and the Marine Corps, Washington, D.C. (Oct. 1, 1997); *see also id.* §§ 5-1b & 5-1g(1) (requiring status determinations by a competent tribunal and providing a right to appeal for interned civilians). These regulations provide an explicit legal process that requires an individualized status determination without exception, and the regulations define the roles and authority of officers in the field and their reviewing authorities.

The United States has put its commitment to these norms into practice in past conflicts by providing procedural protections to verify the status of detainees. After the United States commenced its occupation of Germany at the close of World War II, the military made it an officially published objective "to insure that persons [were] not imprisoned, detained or otherwise punished by German authorities without due process." *Id.* at 72-73 (internal citations omitted). This commitment by the United States to fair legal process made a significant impression on the Germans:

> The complete bewilderment of the average German during legal proceedings before Military Government Courts has been observed . . . . The two ideas which were most startling and inconceivable to the defendants were the opportunity afforded them to be heard and to say what they wished, without fear or compulsion, and the right accorded them to present evidence and witnesses on their own behalf.

Eli E. Nobleman, *The Administration of Justice in the United States Zone of Germany*, 8 Fed. Bar J. 70, 73 (1946).

The United States codified procedural protections for detainees in 1956, providing for "a competent tribunal" to determine the status of

> any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.

U.S. Dep't of the Army, Field Manual on the Law of Land Warfare, FM 27-10 § 71(a) (1956). Until the recent conflicts in Afghanistan and Iraq, the use of tribunals for status determinations had been a consistent component of U.S. policy ever since.

For example, during the Vietnam War, the Military Assistance Command, Vietnam ("MACV"), which ran the U.S. Judge Advocate office in Vietnam, established tribunals under Article 5 of the Third Geneva Convention to determine the enemy combatant, prisoner-of-war, or civilian status of each captured person. *See* MACV Directive No. 20-5, § 5(e) (Sept. 21, 1966, as amended, Dec. 16, 1966), *cited in* Prisoners of War, 10 Whiteman *Digest* § 7, at 216 (1968) ("[i]n . . . doubtful cases the necessity for a determination of status by a tribunal may arise"). The MACV directive made it clear that "the responsibility for determining the status of persons captured by U.S. forces rests with the United States"

and that "[a] tribunal was needed only for a detained person whose legal status was in doubt. This was often the case in Vietnam . . . as rarely did the Viet Cong wear a recognizable uniform . . . . [and] some combat captives were compelled to act for the Viet Cong out of fear of harm to themselves or their families." Frederic L. Borch, *Judge Advocates in Combat* 20-21 (2001).

During the 1983 conflict in Grenada, the United States military again applied the Geneva Conventions. In deciding how to handle the status determinations of each captured person, Army lawyers, in conjunction with the Department of Defense and the Department of State

> determined that the [Third Geneva Convention] applied and that all persons captured should be treated as prisoners of war. This was a significant decision. Individuals afforded prisoner of war status actually receive more rights and privileges than persons placed in a 'retained status' or civilian internees. Thus, although the United States recognized the convention's differentiation between prisoners of war, retained personnel, and civilian internees, *all individuals taken into military custody were regarded as prisoners of war and treated as such until a more informed determination of their status could be accomplished.*

Id. at 66 (emphasis in original omitted and emphasis added, footnote omitted).

Similar practices were followed in other armed conflicts, such as those in Panama and Haiti and the 1991 Persian Gulf war. *See, e.g.*, Maj. Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Obligations Other Than War*, 159 Mil. L. Rev. 152, 168 (1999) ("The U.S. Army afforded all detainees [in Panama] the rights and protections of the Geneva Conventions until their precise status was determined following an Article 5 tribunal."); Office of the Staff Judge Advocate, 10th Mountain Division

(Light Infantry), *Operation Uphold Democracy, Multinational Force Haiti After-Action Report, 29 July 1994–13 January 1995*, at 9 (May 1995) (explaining that the Multinational Force in Haiti "afforded detainees treatment of prisoners of war and due process protections of human rights instruments" as well as Haitian law), *cited in* Center for Law & Military Operations, U.S. Army, *Law and Military Operations in Haiti, 1994-95: Lessons Learned for Judge Advocates*, at 68 n.225 (Dec. 10, 1995), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf; Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War*, at 578 (1992) (noting that the status of almost 1200 enemy detainees from the 1991 Persian Gulf War was determined by tribunals).

As these examples show, the use of tribunals traditionally has been an integral component of the United States' treatment of persons captured on enemy soil. The Government's current practice of imprisoning foreign citizens indefinitely without providing them with an individualized determination of their status represents a sharp break with this historical commitment. Allowing access to the courts is the only means for these detainees to achieve the narrow redress they seek—individualized determinations of their status as required by the Geneva Conventions and U.S. military regulations.

Furthermore, the long-term development and stability of international rules governing the rights of detainees will benefit from judicial review. Courts serve as an important check against arbitrary executive-branch excesses. Moreover, courts applying common-law methodologies are particularly well-equipped to interpret texts such as the Geneva Conventions and U.S. military regulations, and to apply them, without fear or favor, where appropriate based on particular facts. A body of adjudication, and the concomitant creation of more law, would therefore further the fundamental goal of the Geneva Conventions that detainees captured during wartime are treated in accordance

with a stable body of rules that can be predictably applied by, and demanded of, all nations.

C. The Government's Policy In Guantánamo Bay Will Undermine the United States' Ability to Demand Compliance by Other Nations

The United States' moral authority to demand international compliance with the norms expressed in the Geneva Conventions depends on the United States' own demonstrable and principled compliance with these norms, and availability of judicial review is a key component in supporting the United States' moral authority. History shows the value of this moral authority, as the United States has relied upon it many times to demand that other nations treat American and allied prisoners in accordance with the principles of the Geneva Conventions.

For example, during World War I, the United States protested the ill-treatment of American prisoners of war in Germany and demanded that the German government "immediately take such steps as will effectively guarantee to American prisoners in its hands, both in letter and in spirit, that humane treatment which by all the principles of international law and usage is to be expected from the Government of a civilized state and its officials." Secretary of State (Lansing) to the Ambassador in Spain (Willard), telegram 850, Jan. 28, 1918, MS. Department of State, file 763.72114/3240a; 1918 For. Rel., Supp. 2, p. 19, *cited in* Prisoners of War: Treatment, 6 Hackworth *Digest* § 577, at 278 (1943).

Similarly, during World War II, the United States, through Secretary of State Cordell Hull, severely warned Japan that its leaders and citizens would be held accountable for the maltreatment of U.S. and allied soldiers, including the atrocities committed in the Bataan Death March and the abuse of Filipino civilians. *See* 203 Judgment Of The International Japanese War Crimes Trials In The International Military Tribunal For The Far East 49,748

(1948), *cited in* Maj. Michael L. Smidt, *Yamashita, Medina & Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 174 (2000).

When America went to war in Vietnam, the Government recognized that adherence by the United States and its allies to the Geneva Conventions could be used as leverage with the Viet Cong for reciprocal humane treatment of American soldiers. Thus, Secretary of State Rusk stated unequivocally that "[t]he United States Government has always abided by the humanitarian principles enunciated in the Geneva conventions and will continue to do so." Letter from Secretary of State Rusk to Jacques Freymond, Vice President of the International Committee of the Red Cross, reprinted in LIII *Bulletin*, Department of State, No. 1368, Sept. 13, 1965, p. 447, *cited in* Prisoners of War, 10 Whiteman *Digest* § 7, at 214-15 (1968). Moreover, high-ranking military staff "quickly concluded that the Viet Cong might reciprocate with better treatment of U.S. captives if South Vietnam [were to change its treatment of Viet Cong prisoners]." U.S. military officials felt that "[a] unilateral decision by the Saigon government to acknowledge the applicability of the [Geneva Conventions] might . . . 'ameliorate domestic and international criticism of the war.'" Borch, *Judge Advocates in Combat*, *supra*, at 11 (quoting Jeffrey J. Clarke, *Advice and Support: The Final Years, 1965-1973* at 120 (1987)). Ultimately, South Vietnam did change its treatment of Viet Cong prisoners and "the humane treatment eventually afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and more American soldiers and airmen did begin to survive capture." *Id.* at 12 (citations omitted).

Following Iraq's invasion of Kuwait in August 1990, the United States joined other members of the U.N. Security Council in "[c]ondemning the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nations . . . in violation of . . . the [Fourth] Geneva Convention" and

other international agreements. U.N. S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990).

And most recently, in response to the televised display of captured American soldiers by Iraqi authorities, U.S. officials universally chastised this conduct as a violation of the principles of the Geneva Conventions. President Bush stated simply: "I expect [the U.S. prisoners of war] to be treated humanely . . . just like we're treating the prisoners that we have captured humanely. If not, the people who mistreat the prisoners will be treated as war criminals." White House Release, President Discusses Military Operation (Mar. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030323-1.html. Deputy Secretary of Defense Paul Wolfowitz, in a similar note, contrasted Iraqi treatment of prisoners with treatment accorded by the United States:

> We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis . . . that there are very clear obligations under the Geneva Convention to treat prisoners humanely, not to humiliate them, and in this case, I think we'll be in a position before long to enforce any violations of the Geneva Convention. We treat our own prisoners, and there are hundreds of Iraqi prisoners, extremely well. We feed them, we take care of them, they're very safe with us.

Department of Defense News Transcript, Deputy Secretary Wolfowitz Interview with New England Cable News (Mar. 23, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t03242003_t0323nec.html.

As this historical record shows, U.S. treatment of enemy prisoners in accordance with the principles of the Geneva Conventions has been a powerful basis for U.S. demands that American soldiers receive the same standard of treatment. General Eisenhower pithily explained this reasoning in his response to an inquiry by a Soviet general as to why the

United States expended a high level of effort in its treatment of German prisoners:

> [I]n the first place my country was required to do so by the terms of the Geneva Convention. In the second place, the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing.

Dwight D. Eisenhower, *Crusade in Europe* 469 (1949). General Eisenhower's reasoning remains just as valid today.

The United States has enjoyed a long history as a leader in worldwide democracy, humanitarian law, and human rights law. But these past accomplishments and the principles of past conduct do not seem compelling to other nations that have begun to rely on the United States' recent practices as excuses for their human rights abuses:

> African leaders with reputations for political intolerance have learned to use the war against terror as a justification for clamping down on the opposition. Uganda's president . . . and Zimbabwe's [president] . . . have on several occasions referred to their respective opposition elements as terrorists. Platitudes used in speeches by [President Bush] and [Israeli Prime Minister Sharon] have become favorite phrases of African leaders who say they want to "wipe out" or "liquidate" or "crush" the "infrastructure of terror."

See Shehu Sani, *U.S. Actions Send a Bad Signal to Africa Inspiring Intolerance*, Int'l Herald Trib., Sept. 15, 2003; *see also id.* (noting "[t]he insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantánamo Bay . . . helps create a free license for tyranny in Africa").

The United States cannot afford to tarnish its reputation as the standard-bearer for democracy and human rights. If it does, it puts at risk the safety of the men and women of the

U.S. armed forces and its own ability to insist on compliance by other nations with the norms of the Geneva Conventions.

II. THIS COURT SHOULD LIMIT THE SCOPE OF *JOHNSON V. EISENTRAGER*

The decision below creates serious problems and inconsistencies in U.S. legal doctrine. The D.C. Circuit's conclusion that "no court in this country has jurisdiction" to hear the claims of alien detainees captured by the United States military during armed conflict and held outside of the territory of the United States (Odah App. at 14) cannot be reconciled with settled rules of justiciability; it improperly conflates questions of jurisdiction with merits determinations; and it subverts the proper scope of the Great Writ for those who seek to test the legality of their detentions.

The threshold conditions for *jurisdiction* are plainly satisfied here. The detainees have standing to sue, as they have suffered concrete injury (a restriction of liberty without certain procedural protections) caused by the defendants and redressable by the relief sought. And their lawsuits, premised on claims of right arising under the Constitution, treaties of the United States, federal law, and federal military regulations, undeniably present federal questions.

Moreover, there exists a statutory cause of action for vindication of those rights. The federal habeas statute allows a district court to grant the writ to a prisoner if, *inter alia*, "[h]e is in custody under or by color of the authority of the United States" or "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). As a textual matter, the applicability of § 2241 is clear. Indeed, as this Court has observed, challenges to executive detentions invoke the Great Writ's protections in their purest form. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention"); *id.* at 303-04 (noting "the

historical use of habeas corpus to remedy unlawful executive action" and "to redress the improper exercise of official discretion").

In denying the detainees recourse to the courts, the D.C. Circuit, relying primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), reasoned that the detainees have no substantive rights under U.S. law and therefore "cannot invoke the jurisdiction of [U.S.] courts to test the constitutionality or the legality of restraints on their liberty." (Odah App. at 16.) But it is well-settled that the existence *vel non* of a claim of right is separate from the question of subject-matter jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946). The Court should accordingly clarify that any suggestion to the contrary in *Johnson* is not the law.

Moreover, the D.C. Circuit's broad conclusion that, under *Johnson* and this Court's other precedents, alien detainees have *no* rights when detained by the United States military is wrong. While this Court's prior pronouncements on the applicability of the Constitution to aliens abroad have been somewhat unclear, this Court has never held that the rights of such aliens are non-existent. The Court's prior cases rejected only specific claims: *Johnson* held that prisoners of war did not have a right to be tried by civil, rather than military, tribunals, *see* 339 U.S. at 782-83, 785, and *United States v. Verdugo-Urquidez* held only that the Fourth Amendment did not apply to searches of foreign residences, *see* 494 U.S. 259, 275-76 (1990). Neither case held categorically that the Due Process Clause of the Fifth Amendment places *no restraints at all* on the Government's power to detain an alien indefinitely, without notice or an opportunity to contest before a competent tribunal the facts underlying that detention. To the contrary, in discussing the "coverage of our Constitution to nonresident alien enemies," *Johnson* acknowledged that alien enemies are "*entitled*" to precisely what petitioners seek here—a "judicial hearing to determine" their status. 339 U.S. at 784 (emphasis added).

Similarly, concurring in *Verdugo-Urquidez*, Justice Kennedy explained that courts must engage in a case-by-case adjudication of the extent to which constitutional limitations on the power of the United States must yield to other considerations, implying that some constitutional restrictions do apply when the Government acts on aliens abroad. *See* 494 U.S. at 277-78 (Kennedy, J., concurring) (noting that "[t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances" (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring))); *see also id.* at 277 ("when the Government acts, in reference to an alien, within its sphere of foreign operations," the Court "must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad"). It is precisely the sort of case-by-case adjudication anticipated by Justice Kennedy that the decision below forestalls.

Moreover, this Court has recognized that even where a specific constitutional right does not apply, a similar right can be made applicable to an alien abroad by "the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275. The rights asserted by petitioners here were created by the political branches and, as discussed above, find expression in, among other things, the Geneva Conventions, which have been ratified by the United States, and in the Army regulations, which "implement[]" the Geneva Conventions, *see* Army Regulation 190-8 § 1-1*b*; *see also id.* § 1-1*b*(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

Indeed, the writ of habeas corpus has "traditionally issued as a means of reviewing the legality of the detention of aliens in the face of alleged treaty violations." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 221 (3d Cir. 2003); *see also Mali v.*

Keeper of the Common Jail, 120 U.S. 1, 11 (1877) (considering habeas corpus petition brought on behalf of alien sailor alleging violations of consular agreement between the United States and Belgium). Thus, in other contexts, the circuit courts have agreed that habeas relief is available under § 2241 for an individual who claims his continued detention violates a treaty, at least where the treaty has been implemented by federal law and regulations. *See, e.g.*, *Ogbudimkpa*, 342 F.3d at 221 & n.24; *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Similarly, courts "review military determinations by habeas corpus to insure that rights guaranteed by . . . military regulations are protected." *Allgood v. Kenan*, 470 F.2d 1071, 1073 (9th Cir. 1972); *see also Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976) (noting that "habeas corpus is available . . . where there is a breach [by the military] of a self-imposed procedural regulation").[3]

An interpretation of the habeas statute denying detainees access to the courts, at least where, as here, no alternative tribunals have been established, would also run afoul of the canon of statutory interpretation that "an act of Congress

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[3] That the military has implemented the Geneva Conventions in its regulations obviates the need to address whether the Conventions would otherwise be enforceable in U.S. courts. While the general rule is that a treaty must be "self-executing" to give rise to a cause of action, it is unclear whether this rule bars the assertion of treaty rights where another statute, such as § 2241, creates the cause of action. *See Ogbudimkpa*, 342 F.3d at 218 n.22 (explaining, but sidestepping, "the interesting issues . . . with respect to the availability of habeas relief under a non-self-executing treaty absent implementing legislation."). Whether the Geneva Conventions are self-executing is also unsettled. *See, e.g.*, *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (concluding that certain provisions of the Geneva Conventions are enforceable by POWs in court).

ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963) (avoiding construction of National Labor Relations Act that, *inter alia*, would have been contrary to a "well-established rule of international law"); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (stating that "some affirmative expression of congressional intent to abrogate the United States' international obligations is required" to construe a statute in a manner that would cause such abrogation). As the United States has previously acknowledged, the right to a status determination is required by international law:

> [The United States] support[s] the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

Martin D. Dupuis et al., *The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 415, 425-26 (1987) (statement of Michael J. Matheson, Deputy Legal Adviser, United States Dep't of State); *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1389 (10th Cir. 1982) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.") (citing Universal Declaration of Human Rights, Arts. 3 and 9, U.N.Doc. A/801 (1948)).

There is, therefore, no valid basis for the D.C. Circuit's conclusion that the federal courts lack *jurisdiction* over petitioners' claims. To the contrary, in a world in which the United States seeks to persuade other nations to govern in accordance with the rule of law, the United States must honor its own commitment thereto by providing a judicial forum for testing the legality of its own executive detentions.

CONCLUSION

For the reasons set forth above, the Court should reverse the D.C. Circuit's decision and remand this case for further proceedings.

Respectfully submitted,

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